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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/805,876

03/22/2004

Gene Probasco

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9875

21874

7590

12/04/2008

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EXAMINER

LEVY, NEIL S

ART UNIT

PAPER NUMBER

1615

MAIL DATE

DELIVERY MODE

12/04/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/805,876	Applicant(s) PROBASCO ET AL.	
	Examiner NEIL LEVY	Art Unit 1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 September 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3 and 5-13 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3 and 5-13 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>9/23/08; 8/28/08</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim Rejections - 35 USC § 112

Claims 1-3,5-13 STAND rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

There is no explanation of what constitutes liquid soap; and no examples as such, emulsifiers are seen as meeting this requirement: see LOCKE et al 5372817, column 6, lines 14-17.

Claim13 IS rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. It is unclear where & WHEN the emulsion, Beta acids, & soap are applied. “soap is present___” is insufficient to describe whether applied with or before the acids & emulsion—is it as a composition with acid & emulsion?

Claim Rejections - 35 USC § 103

Claims 1 -3, 5—13 stand rejected under 35 U.S.C. 103(a) as being unpatentable over JONES et al '96 in view of LOCK et al 5372817 or SOUTER et al U S2003/00600379.

JONES, of record, shows B acids are antifungal and acaracidal, and applies to bean leaf. However, no soap is evident, in either reference. Nutter teaches Beta acids, lupulones and analogs thereof from HOPS, are known pesticides (col. 3, lines 1-6, col. 4, line 3-34).. Aqueous alkaline solutions with emulsifiers, polyols, are provided which are dispersible in water (col. 5, line 18-33) and are useful as solution, suspension, or emulsion (line 65, 66, col. 5).

SOUTER shows liquid soaps [0018] with emulsifier [0043] is safe and effective to control spider mites [0011]. Additional pesticides are supplemented [0039]. Thus,

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those of JONES, B hop acids, would be obvious to use as GRAS pesticides, to provide a safer pesticidal means of protecting crops from mildew and mites.

LOCKE (column 2, line 48; column 3, line 5) applies safer pesticides to control fungus and insects (column 5, lines 24-26) on plants, applied as a liquid soap (column 4, bottom) with other safe insecticides and surfactants (column 5, lines 35-41) like the Tweens (column 6, lines 14-18) or tritons.

One in the art would find it obvious to provide B acids with other plant extracts of LOCKE and soaps of SOUTER, in order to provide non-target safe anti-mildew, anti-spider mite liquid compositions.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made desiring to utilize natural compounds as pesticides, to use the Beta acids of Jones, to control mites and aphids of crops using emulsified solutions as of SOUTER, in order to provide a natural product- one treatment means to control mites, Aphids, and bacteria with sprayable forms emulsified.

There is no distinguishing disclosure of the instant composition as providing an unusual and/or unexpected results obtained since the prior art is well aware of the use of hops and extracts thereof as pesticides.

The selection of the instant non-critical pest control ingredients and concentrations are result effective parameters chosen to obtain the desired effects. It would be obvious to vary the concentration each ingredient to optimize the effect desired and the use of ingredients for the functionality for which they are known to be used is not a basis for patentability.

Double Patenting

Claim 1, 2 stand provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 3, 10, 14, 15, 17, 18 of copending Application No. 11/00878

. Although the conflicting claims are not identical, they are not patentably distinct from each other because The methods, steps are the same, thus any pest on a plant would be affected..

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

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The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to NEIL LEVY whose telephone number is 571-272-0619.

The examiner can normally be reached on Tuesday-Friday, 7 AM to 5:30 PM EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, MICHAEL WOODWARD can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/NEIL LEVY/
Primary Examiner, Art Unit 1615
